Voluntary Associations and the Rule of Law[1]

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> What we actually see in the world is not on the one hand the State, and on the other a mass of unrelated individuals; but a vast complex of gathered unions, in which alone we find individuals, families, clubs, trades unions, colleges, professions, and so forth; and further, that there are exercised functions within these groups which are of the nature of government, including its three aspects, legislative, executive, and judicial; though, of course, only with reference to their own members. —JN Figgis

1 Introduction

In *Lakeside Colony of Hutterian Brethren v Hofer*,[2] seven members of the Lakeside Colony of Hutterian Brethren — a voluntary community, dedicated to living in accord with religious principles such as community of property and deference to elders — went to court to contest their expulsion. They had been expelled as a result of a dispute over who invented a new hog-feeder. The expulsion had large consequences. The expelled members would have to leave their homes and the place they had worked their whole lives, and due to the communal property regime they would leave with nothing. They argued that the expulsion was invalid because they had been denied natural justice: specifically, they had not been given proper notice or the chance to make representations to the decision-making body. The Supreme Court of Canada agreed. The colony was free to expel members who didn't follow its rules, but it had to do so fairly.

This paper is about why voluntary associations are sometimes subject to natural justice requirements. In other words, it is about why such groups are sometimes required by law to be fair to their members. Courts have recognized these requirements for a long time. In *Baird v Wells*,[3] Baird was a member of the Pelican Club, a social club whose members paid a subscription in exchange for the right to use the premises. Baird was accused of having behaved in an ungentlemanly manner, and the Club formed a committee to investigate. The committee upheld one of the charges and requested Baird's resignation. Baird went to court. The court held that, while it could not "act as a Court of Appeal from the decisions of committees of clubs", it could entertain three questions: "first, whether the rules of the club have been observed; secondly, whether anything has been done contrary to natural justice; and, thirdly, whether the decision complained of has been come to *bonâ fide*".[4] Given that the committee's proceedings had been flawed, Baird was entitled to damages.

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[1] I would like to thank Gurpreet Rattan, Arthur Ripstein, Joanna Langille, Ryan Liss, Zoë Sinel, Jason Neyers, David Sandomierski, John Enman-Beech, Benjamin Miller, audiences at Western Law and the Canadian Law of Obligations III, and four anonymous referees for comments. Thanks to Maja Soltysiak for research assistance.

2 [1992] 3 SCR 165. For historical and religious context, see Alvin Esau, "Communal Property and Freedom of Religion: *Lakeside Colony of Hutterian Brethren v. Hofer*" in John McLaren & Howard G Coward (eds), *Religious Conscience, the State, and the Law : Historical Contexts and Contemporary Significance* (1998) State University of New York Press, and for discussion of the jurisprudential background and uptake, see Kathryn Chan, "Lakeside Colony of Hutterian Brethren v Hofer: Jurisdiction, Justiciability and Religious Law", in Renae Barker, Paul T Babie, and Neil Foster (eds), *Law and Religion in the Commonwealth: The Evolution of Case Law* (2022) Hart Publishing.

[3] (1890), 44 Ch D 661.

[4] Ibid at 671.

While courts have long recognized these requirements, there is no settled explanation in the case-law of why they should apply. On its face, the fact that natural justice is required here is puzzling, given that voluntary associations are legally constituted by property and contract law, and natural justice is not usually required by property or contract law.[5] Natural justice is much more at home in administrative law, but administrative law does not, typically, apply to voluntary associations.[6] Why, then, do these requirements apply?

This question has broad implications, as voluntary associations, like political parties, unions and social clubs, are, to a large extent, where we pursue the things that matter to us. The procedures followed in such associations have a significant impact on the lives of their members. If we can't explain why natural justice is required, it becomes tempting to suggest that the existing doctrine is mistaken, or at best a result of outcome-driven judicial reasoning. In this paper, I'm going to argue that the doctrine is correct, but that the main theoretical frameworks courts and academics have appealed to, rooted either in public law or in private law separately, are inadequate for making sense of it. We need a theory which explains what voluntary associations share both with public law and with private law.[7] I will propose such a theory.

My focus is on the common law, which remains the major source of law governing intervention in voluntary associations.[8] I will not spend much time on statutory frameworks applicable to certain voluntary associations. Nor will I address aboriginal rights, Indigenous law, domestic human rights law or constitutional protections such as freedom of religion and association. In practice, all of these bodies of law occasionally come to bear on voluntary associations.

Let me explain up front what I mean by a 'voluntary association', and why this is a useful category of analysis. I take an 'association' to be a group which requires its members to follow certain rules. Not all groups are associations in this sense: for example, a family typically operates by way of feelings and personal relations rather than rules. I take an association to be 'voluntary' when its members are free to exit. Not all associations are 'voluntary' in this sense: the state is a group which requires its members to follow rules, but most people have no option to leave the state they belong to. Finally, for purposes of this article, I will exclude those voluntary associations which pursue criminal ends and those which primarily pursue profit (such as business corporations and partnerships). While my normative arguments might apply just as well to criminal or profit-driven associations, these kinds of groups are subject to their own bodies of law — criminal law, corporate law and partnerships law — which I will not have space to discuss.

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[5] See Terence Daintith, "Contractual Discretion and Administrative Discretion: A Unified Analysis" (2005) 68(4) MLR 554-593 and *Lymington Marina Ltd v MacNamara & Ors*, [2007] EWCA Civ 151 at para 37. Daintith observes at 572 that in the case of contracts which constitute associations, "the parallels with public regulation have always been recognized as strong", but outside of this context "the embrace of administrative law ideas has been more discreet".

[6] See also Patrick Hart, "Justice for W(all): Judicial Review and Religion" (2017) 43:1 Queen's LJ 1 at 12n43. Attempts to subject voluntary associations to judicial review have been rejected: *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, 2018 SCC 26. This is true even for highly regulated associations such as political parties: *Knox v Conservative Party of Canada*, 2007 ABCA 295.

[7] This in-between status has been noted of specific kinds of associations: see Kathryn Chan, *The Public-Private Nature of Charity Law* (Hart, 2016) at 7 and Adam Parachin, "Public Benefit, Discrimination and the Definition of Charity" in Kit Barker & Darryn Jensen (eds), *Private Law: Key Encounters with Public Law* (2013) Cambridge University Press on charities and Elizabeth Anderson, *Private Government* (Princeton University Press, 2017) on workplaces.

8 In British Columbia, the common-law principles are in part replaced by the *Societies Act*, SBC 2015, c 18, but cases under the *Societies Act* borrow heavily from the common-law principles which I'll discuss.

Despite their importance in social and political life, voluntary associations are undertheorized. There is older scholarship reflecting on the law of voluntary associations and related normative questions.[9] More recent scholarship, however, has tended to focus on different sorts of voluntary associations, without attempting a coherent treatment of the whole field.[10] This may reflect doubt that a general theory is possible, given the wide variety of voluntary associations. Can one theory cover the Lakeside Colony, the Conservative Party and the Pelican Club?

I have two answers to this concern. First, voluntary associations share a basic structure. They involve the use of private rights — primarily rights in property and contract — to set up rules which individuals can choose to subject themselves to or not. This is true both of a political party and of a social club: in both cases, contract and property law are used to set rules under which members associate. This makes sense, because both a political party and a social club are voluntary, and private law is designed to structure voluntary interactions between persons. There is nothing surprising in the fact that similar legal structures can be used to pursue a variety of different purposes; this purpose-neutrality is typical of private law. (It is why we can have a single theory of contract law, despite the vast differences between contracts of employment, guarantees, and public-private partnerships.)

It's true, of course, that some voluntary associations are subject to significant statutory regulation. For example, political parties are subject to election legislation. But such legislation typically sits on top of, rather than displacing, the private law structure of voluntary associations. The relationship between a political party and its members is contractual, even though it is subject to statutory constraints.[11] As a result, there can be a shared basis for imposing natural justice on political parties and social clubs despite their differences.

My second response to the concern is that my account provides for significant, structured variation in whether and how natural justice applies to different associations. There are many different kinds of associations, and it would be inappropriate to constrain them all in the same way.[12] I will explain why natural justice applies to different degrees in different associations. This coheres with the principle that the content of natural justice varies with context.[13] The wide variety of voluntary associations is not a reason to avoid theorizing about them; it is a fact which a theory of them must take into account, by explaining how differences among voluntary associations are reflected in the applicable legal rules.

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9 See Zechariah Chafee, Jr., "The Internal Affairs of Associations Not for Profit" (1930) 43 Harv L Rev 993; JW Morris, "The Courts and Domestic Tribunals" (1953) 69 Law Q Rev 318; Anon., "Developments in the Law–Judicial Control of Actions of Private Associations" (1963) 76 Harv L Rev 983; SJ Stoljar, "The Internal Affairs of Associations" in LC Webb (ed), *Legal Personality and Political Pluralism* (1958) Melbourne University Press at 66; AC Holden, "Judicial Control of Voluntary Associations" (1971) 4 NZULR 343; Samuel Wex, "Natural Justice and Self-Regulating Voluntary Associations" (1972) 18:2 McGill LJ 262; Robert E Forbes, "Judicial Review of the Private Decision Maker: The Domestic Tribunal" (1976) 15 UWO L Rev 123.

10 On unions, see Michael Lynk, "Denning's Revenge: Judicial Formalism and the Application of Procedural Fairness to Internal Union Hearings" (1997) 23 Queen's LJ 115. On churches, see MH Ogilvie, "Are Members of the Clergy Without the Law? *Hart v Roman Catholic Episcopal Corporation of the Diocese of Kingston*" (2014) 39:2 Queens LJ 441; MH Ogilvie, *Religious Institutions and the Law in Canada* (2017) Irwin Law; Paul Billingham, "The Scope of Religious Group Autonomy: Varieties of Judicial Examination of Church Employment Decisions" (2019) 25:4 Leg Theory 244. On charities, see Matthew Harding, *Charity Law and the Liberal State* (2014) Oxford University Press.

11 *Karahalios v Conservative Party of Canada*, 2020 ONSC 3145 at para 178.

12 *Orchard v Tunney*, [1957] SCR 436. See also *Barrie v Royal Colwood Golf Club*, 2001 BCSC 1181 at para 59.

13 See *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817.

I'm going to begin by considering two well-understood sources of normative constraint — one based in public law, the other based in a Kantian understanding of private law — to assess whether they can make sense of the role of natural justice in voluntary associations. I'm not claiming to address all possible theories of voluntary associations, and my conclusions are always subject to the possibility that someone may propose a better theory. I consider these two theories in part because both can be found in the case law on voluntary associations, and in part because public regulation and private agreement are the two most natural places to ground the authority of legal rules. Most importantly, however, both of these theories provide insights which I will build on in my own proposal. While neither theory is adequate, working through them will help us understand what an adequate theory needs to do.

Let me briefly sketch how the argument will go. According to the public law theory, constraints on voluntary associations are an instance of the legitimacy conditions that apply to public authorities. The problem with the public law theory is that it would subject voluntary associations to far more stringent constraints than natural justice. According to the Kantian private law theory, constraints on voluntary associations are derived from the formal limits on ordinary property and contract rights. The Kantian private law theory makes room for natural justice constraints as duties of the relevant private law offices, but it fails to explain why these duties exist. The upshot is that, though they are constituted within private law, voluntary associations have to be understood as sources of a distinct kind of authority with its own internal limits. These limits are grounded in the role of voluntary associations in setting the rules under which individuals pursue their ends. My account explains why voluntary associations are subject to natural justice but not to the whole gamut of public law principles.

The paper goes as follows. In section 2, I summarize the common law requirements of natural justice in voluntary associations. In section 3, I discuss the public law theory and show that while it explains natural justice, it also generates less plausible requirements. In section 4, I discuss the Kantian private law theory and show that while it leaves room for natural justice requirements, it does not explain why they apply. In section 5, I introduce my own view, which distinguishes two organizing principles in voluntary associations and argues that natural justice flows from one of them. In section 6, I respond to objections. In section 7, I conclude.

2 Common-law requirements of natural justice in voluntary associations

In this section, I summarize the common-law requirements of natural justice in voluntary associations. To start, not all voluntary associations involve legal relations among their members. For example, a book club might have rules governing its members without those rules being contractually binding.[14] The basic common-law rule is that a court may intervene in the affairs of a voluntary association only where a legal right is affected.[15] In older cases, courts sometimes held that they could intervene only where a property right was at issue. For example, in *Rigby v Connol*, where a member was expelled from a union, Lord Jessel MR held:

[14] *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v Aga*, 2021 SCC 22 at para 23; *Hannan v Scouts Canada*, 2024 ONSC 5361 at para 32.

[15] *Ethiopian Orthodox*, at para 27; *Dunnet v Forneri* (1877), 25 Gr 199 (Ont Ct Chancery) at 206.

> I have no doubt whatever that the foundation of the jurisdiction is the right of property vested in the member of the society, and of which he is unjustly deprived by such unlawful expulsion. There is no such jurisdiction that I am aware of … to decide upon the rights of persons to associate together when the association possesses no property. … A dozen people may agree to meet and play whist at each other's houses for a certain period, and if eleven of them refuse to associate with the twelfth any longer, I am not aware that there is any jurisdiction in any Court of Justice in this country to interfere.[16]

It is now clear that the deprivation of a proprietary interest in the association's assets is not the only basis for intervention; other legal rights, such as contractual rights, can also give courts jurisdiction.[17] Still, some legal right is required. In what follows, my discussion is limited to cases where a legal right is affected by an association's decision.

Where an association's decision affects a member's rights, courts require that the decision be made in a procedurally fair manner.[18] In *Dawkins v Antrobus*,[19] one Colonel Dawkins had written a pamphlet about another club member, entitled "A Farce and a Villainy — Heads I Win, Tails you Lose", and mailed it to him in an envelope labelled "Dishonourable Conduct of General Stephenson". Dawkins was expelled. Despite these quaint facts, the court's statement of the grounds on which it might intervene in a voluntary association remains correct:

> [T]he only questions which a Court can properly entertain … are, whether anything has been done which is contrary to natural justice, although it is within the rules of a club — in other words, whether the rules of the club are contrary to natural justice; secondly, whether a person … has been acted against contrary to the rules of the club; and thirdly, whether the decision of the club has been come to *bonâ fide* or not.[20]

In other words, the decision must accord with the rules of the club and with natural justice, and must be made in good faith.

For our purposes, natural justice is the most important requirement. In *Posluns v Toronto Stock Exchange*,[21] the Board of Governors of the Toronto Stock Exchange withdrew its approval of Posluns' role in a company. Among the challenges to the Board's decision was that Posluns had been denied natural justice. The court held that "before a member of a social club, trade union, trade or professional association, can be expelled or suspended therefrom, he must be given notice of the charges against him and be afforded an opportunity of answering those charges." The

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[16] *Rigby v Connol* (1880), 4 Ch D 482 at 487 (emphasis added); see also *In re St James' Club* (1852), 2 D M & G 383. For discussion, see Roscoe Pound, "Equitable Relief against Defamation and Injuries to Personality" (1916) 29:6 Harv L Rev 640 at 677-680; Mullan, "Administrative Law at the Margins" at 138-139.

[17] See *Lakeside* at 175 and *Lee v Showmen's Guild of Great Britain* [1952] 2 QB 329. Only a party to the contract may sue for its breach: *Bertrand v Academic Medical Organization of Southwestern Ontario*, 2024 ONCA 319.

[18] In older cases the requirement of an impact on legal rights was equated with the association's decision being "quasi-judicial": Wex, "Natural Justice and Self-Regulating Voluntary Associations" at 264-266.

[19] (1881), 17 Ch D 615 (CA)

[20] *Dawkins* at 630 (emphasis added). See also *Fisher v Keane* (1879), 11 Ch D 353 at 362.

[21] [1964] 2 OR 547 (Sup Ct), aff'd [1966] 1 OR 285 (CA), aff'd [1968] SCR 330.

requirement of natural justice has been applied to a wide range of groups, including religious organizations, unions and sports clubs, in Britain, Canada and other common law jurisdictions.[22]

The requirement applies whether or not natural justice is explicitly set out in an association's governing documents. For example, in *Cronin v Greyhound Board of Great Britain Ltd*, the England and Wales Court of Appeal considered a decision of the Greyhound Board, which regulated greyhound racing.[23] The court described the Board as follows: "It is not a statutory body. It is a private sector regulator constructed on contractual foundations but which, when exercising its disciplinary powers, is subject to requirements of fairness, whether or not they are expressed in the rules it has adopted."[24]

The requirements of natural justice in these contexts are very similar to the requirements of procedural fairness in administrative law. The basic principles are the right to be heard and the right to an impartial tribunal, though the content of these principles varies with context.[25]

The right to be heard requires that the person whose rights are affected have a chance to make representations. This requires notice of the fact that a decision is going to be made, and typically of the case to be met, as well as a chance to present one's side.[26] In *Young v Ladies' Imperial Club*, a member's expulsion was set aside because the notice of the relevant meeting did not indicate that it might happen.[27] In *Lakeside*, the court held that a member "must … be given an opportunity to respond to the allegations made", but the precise requirements can vary; for example, a formal hearing is not always required.[28] One court has suggested that in some proceedings in voluntary associations there may be a duty to give reasons.[29]

The right to an impartial tribunal requires that a court ask itself whether "a fair minded and informed observer" would "conclude that there was a real possibility that the tribunal was biased".[30] However, impartiality in a voluntary association can look different from other contexts: in many associations, decision-makers will inevitably have prior knowledge of the issue and some indirect interest in its resolution.[31] Just as courts in administrative law often express deference towards administrative tribunals, courts reviewing the decisions of voluntary associations have expressed a desire to give them "as great a latitude as is consistent with the fundamental requirements of fairness", particularly when it comes to matters "which those bodies are far better fitted to judge than the courts".[32]

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[22] See *Posluns* (SCC); *Lakeside Colony*; *Leary v National Union of Vehicle Builders*, [1970] 3 WLR 434 (Ch D); *Stevenson v United Road Transport Union*, [1977] ICR 893 at 903; *Calvin v Carr*, [1979] 2 WLR 755 (PC Aust); and more generally Stephen Aylward, *The Law of Unincorporated Associations in Canada*, (Toronto, Ontario: LexisNexis Canada, 2020) at §8.26-8.38.

[23] [2013] EWCA Civ 668.

[24] *Cronin* at para 1 (emphasis added); see also *Posluns* (Sup Ct).

[25] *Lakeside Colony* at 195. For procedural fairness in administrative law, see *Baker v Canada*, [1999] 2 SCR 817 at paras 21-28 and *Therrien (Re)*, 2001 SCC 35 at para 82.

[26] For administrative law examples, see *Nicholson v Haldimand-Norfolk Regional Police Commissioners*, [1979] 1 SCR 311; *Singh v Minister of Employment and Immigration*, [1985] 1 SCR 177; *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643; *Duncan v. Toronto Community Housing Corp*, 2015 ONSC 4728.

[27] *Young v Ladies' Imperial Club*, [1920] 2 KB 523 (CA), cited in *Lakeside* at 196.

[28] *Lakeside* at 196; see also *McInnes v Onslow Fane* [1978] 1 WLR 1520 at 1536.

[29] *Cronin*, at para 16; cf *Baker*, at paras 41-43 and *Vavilov*, at para 77.

[30] *Flaherty v National Greyhound Racing Club Ltd*, [2005] EWCA Civ 1117 at para 27; cf *Newfoundland Telephone Co v Newfoundland*, [1992] 1 SCR 623.

[31] *Lakeside Colony* at 197.

[32] *Flaherty* at para 19, quoting in part from *McInnes* at 1535; see also *Dawkins* at 630.

3 The public law theory

In this section, I introduce and criticize what I call the 'public law theory'. The public law theory is that, like the authority of the state, the authority of voluntary associations is subject to legitimacy conditions, including natural justice. This is not, of course, the only way of drawing on public law ideas to make sense of voluntary associations; the theory I will propose later in this paper also draws on such ideas. Rather, it is one particular way of doing so, found in both case-law and academic discussion.

In *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, the plaintiff sought judicial review of his expulsion from a congregation of Jehovah's Witnesses.[33] The Supreme Court of Canada held, overturning the lower courts, that the decisions of a voluntary association are not subject to judicial review. Judicial review is the form of proceeding used to supervise the exercise of state power. Voluntary associations do not exercise state power. Their authority is not delegated from the state but derives from the agreement of their members.

The thought of the plaintiff in *Wall*, and of the lower courts who agreed with him, was that the law should constrain exercises of 'governmental' power, whether or not that power derives from the state. After all, voluntary associations make rules, elect officials to act on the rules and even have judicial bodies to decide disputes. As Denning LJ wrote, dissenting in *Breen v Amalgamated Engineering Union*, about the rules of a trade union:

> Their rules are said to be a contract between the members and the union. So be it. If they are a contract, then it is an implied term that the discretion should be exercised fairly. <u>But the rules are in reality more than a contract. They are a legislative code laid down by the council of the union to be obeyed by the members.</u> This code should be subject to control by the courts just as much as a code laid down by Parliament itself.[34]

This thought is too crude. The rules of a voluntary association like a trade union are not literally a legislative code; however similar the workings of voluntary associations look to the workings of the state, they are not actually organs of the state, and there is no basis for subjecting their decision-making to judicial review.

Yet the plaintiff in *Wall* was not wrong to see similarities between the rule-making and rule-applying power of some voluntary associations and the legislative and executive activity of the state. As Lord Denning said in *Breen*, "the powerful associations which we see nowadays … delegate power to committees. These committees control the destinies of thousands. They have quite as much power as the statutory bodies of which I have been speaking."[35] There are also similarities, as I noted earlier, between the natural justice requirements imposed on voluntary associations and those imposed on administrative tribunals.[36] In *Onslow Fane*, the plaintiff had been refused a boxing manager's license by the British Boxing Board of Control (a voluntary

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33 2018 SCC 26 [*Wall*]. For a review of relevant UK case law, see Paul Craig, "Public Law and Control over Private Power" in Michael Taggart (ed), *The Province of Administrative Law* (1997) Hart Publishing.

34 [1971] 2 QB 175 (CA) at 190 (emphasis added); for more of Denning's approach, see *Showmen's Guild*; *Nagle v Feilden*, [1966] 2 QB 633; and *Enderby Town FC Ltd v Football Association Ltd*, [1971] Ch 591.

35 *Breen* at 190.

36 Indeed, these requirements are often discussed together in older cases: see e.g. *Ridge v Baldwin*, [1963] 2 All ER 66 at 74 and *Wood v Woad* (1874), LR 9 Exch 190 at 196.

association). He argued that he should have been given reasons and a hearing. While the court rejected the claim — as a mere applicant, nothing was being taken away from the plaintiff, so he was not entitled to reasons or a hearing — it did hold that "the board were under a duty to reach an honest conclusion, without bias, and not in pursuance of any capricious policy". As Dawn Oliver has commented, this formulation, with its emphasis on impartiality and lack of caprice, is reminiscent of administrative law.[37]

This suggests that a less crude version of the thought might be made to work. While voluntary associations are not literally subject to judicial review, perhaps the normative structure that justifies judicial review in the case of the state also justifies judicial control of large voluntary associations. Oliver articulates Lord Denning's view in this way:

> Powerful bodies, whether public or private, are under duties of fairness and rationality in certain circumstances, particularly where their decisions have a serious adverse effect on an individual … [T]he implication of *Breen* is that, even though it is necessary to proceed by way of application for judicial review in public law cases … the same or similar duties of fairness and rationality may arise in private law.[38]

As John Alder has similarly argued, "the purpose of judicial review is to provide a remedy against abuse of power by public and private bodies alike. … On this basis the public law-private law distinction should not be the determining factor."[39] He spells out the theory as follows:

> The distinction between governmental and private bodies does not govern the scope of the substantive law. The supervisory jurisdiction over private bodies has included error of law unreasonableness, irrelevant considerations, fettering discretion and irrationality, although natural justice cases have predominated. The scope of review over private bodies has been assimilated with that over public bodies.[40]

Procedurally speaking, control of voluntary associations is not an instance of judicial review, but judicial review and control of voluntary associations may have the same substantive basis.[41]

What is the substantive basis for subjecting state decisions to judicial review on grounds such as procedural fairness? A plausible idea is that the coercive authority of the state is subject to *legitimacy conditions*.[42] A state does not need to be perfectly just in order to be entitled to our obedience, but it does have to meet some minimal standard. If it falls short of that standard, we have no duty to obey its decisions (although we may nevertheless have independent duties to act

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[37] Dawn Oliver, "Lord Denning & The Public/Private Divide" (1999) 14:1 Denning Law Journal 71 at 75.
[38] Oliver, "Lord Denning & The Public/Private Divide" at 73; see also ibid at 79: "the justifications for imposing duties of fairness and rationality in private decision making and in public decision making are the same".
[39] John Alder, "Obsolescence and Renewal: Judicial Review in the Private Sector" in Peter Leyland & Terry Woods (eds), *Administrative Law Facing the Future* (Oxford University Press, 1997) 160 at 162.
[40] Alder, "Obsolescence and Renewal" at 171. See also Philip Murray, "Natural Justice at the Boundaries of Public Law" (November 20, 2013). University of Cambridge Faculty of Law Research Paper No. 3/2014.
[41] See David Mullan, "Administrative Law at the Margins", in Michael Taggart (ed), *The Province of Administrative Law* (1997) Hart Publishing at 135.
[42] See Fabienne Peter, "Political Legitimacy", *The Stanford Encyclopedia of Philosophy* (Winter 2023 Edition), Edward N Zalta & Uri Nodelman (eds), URL = <https://plato.stanford.edu/archives/win2023/entries/legitimacy/>.

in conformity with some of the laws, such as laws against murder). There are different views about what the minimal standard is, but we need not choose here. For it is highly plausible, whichever view we take, that the minimal standard includes natural justice.[43]

The public law theory holds that, like the authority of the state, the authority of voluntary associations is subject to legitimacy conditions. Just as we have no duty to obey an unjust state (whatever 'justice' comes to here), we have no duty to obey an unjust association. Spelled out in legal terms, the theory holds that while voluntary associations are not subject to the explicit terms of the constitution,[44] nor directly subject to judicial review, they are subject to the same unwritten constitutional principles — in particular, the principle of the rule of law — implicit in the legal order.[45] This is why it is right for courts to enforce natural justice constraints against them.

This view suggests a broad conception of the governing powers in our legal order, going beyond those that are part of the state. Such a conception has been discussed by Ruth Dukes, building on earlier work by the early labour law theorist Hugo Sinzheimer.[46] Sinzheimer conceptualized the rules that allowed for economic actors, such as unions and industry, to participate in regulating the economy as 'the economic constitution'; as the phrase suggests, these rules play a constitutional role, defining and constraining public authority.[47] Along similar lines, we might think of "the powerful associations which we see nowadays" as playing a constitutional role. Voluntary associations which attain sufficient size and influence can define the rules upon which individuals interact.

The public law theory displays a broad concern to protect individuals from arbitrary power, no matter the source of the power.[48] For example, if we think it important that individuals be able to practice the religion of their choice, we might not see an important difference between a state prohibition on practicing a religion and heavy social pressure against practicing it — both could make it difficult to do. Similarly, if we're concerned to protect people against discrimination, it would be insufficient to rest with equality rights only against the state; such rights don't protect people against the discrimination they can be subject to in the social realm which voluntary associations partly constitute.

There is something attractive about the public law theory's refusal to be taken in by differences in official status. Is there really a normative distinction between the state and a private institution which exercises *de facto* regulatory authority? Despite this, the theory has awkward consequences. Recall that it holds that voluntary associations, or at least those exercising 'governmental' power, are subject to the same legitimacy conditions as the state. Now, while these conditions include natural justice, they are not limited to natural justice. Let me give two examples.

First, a modern state whose citizens believe in many different 'comprehensive doctrines', such as Islam, humanism or Marxism, is subject to a duty of neutrality. On Rawls' way of working

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43 See Hamish Stewart, "Procedural Rights and Factual Accuracy" (2020) 26:2 Leg Theory 156.

44 Section 32 of the *Canadian Charter of Rights and Freedoms* limits its application to the federal, provincial and territorial legislatures and governments. See *York Region District School Board v Elementary Teachers' Federation of Ontario*, 2024 SCC 22 at paras 72-73.

45 *Roncarelli v Duplessis*, [1959] SCR 121 at 142; *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 70.

46 Ruth Dukes, *The Labour Constitution: The Enduring Idea of Labour Law* (Oxford: Oxford University Press, 2014) ch 2-3.

47 Dukes, *The Labour Constitution* at 13.

48 See Robin L West, "Reconsidering Legalism" (2003) 88 Minn L Rev 119 and JS Mill, "On Liberty" in John Gray, ed, *On Liberty and Other Essays* (Oxford: Oxford University Press, 1998).

out this idea, the state's power is legitimate only if it is regulated by a political conception of justice — a conception that is not dependent on any particular comprehensive doctrine.[49] The state's laws and decisions have to be justifiable in terms of public reason, which eschews appeal to anything outside of the political conception. A state which only attempts to justify itself in terms of some comprehensive doctrine is not legitimate. One expression of this point is that the state's duty of neutrality precludes a municipal council from beginning its meetings with a prayer.[50]

Second, democracy is also a condition of legitimacy in a modern state.[51] Consider an autocratic state whose subjects have no say in choosing their rulers or their laws, but where those laws are reasonable, public, and applied impartially. It seems highly plausible that the subjects have a right to press for democratic reforms, and — should such reforms not be forthcoming — to replace the existing state with a democratic one. (Not everybody accepts this. Jacob Weinrib, for example, argues that a legitimate state must create a condition in which individuals can interact on terms of equal freedom, but need not be democratic.[52] But while this might be the case for a minimal state which merely protects property and personal safety, it is surely not the case for a state that pursues more substantive goals. If individuals are conscripted into pursuing ends together, they should have a say in what those ends are.)

The upshot is that while the rule of law may be a necessary condition of legitimacy, it is not a sufficient condition. Legitimacy also requires a neutral public basis for lawmaking and decision-making, and it may require democratic control. Now, if voluntary associations of sufficient size and power are subject to legitimacy conditions, then it follows that these associations are also required to make decisions on the basis of public reason and to be democratic. Jacob Levy has described (though he rejects) the resulting view:

> [Groups] are normatively constrained to be democratic, constitutional, and rights-respecting. The state ought to be governed by the consent of a majority of its members; so ought an association. The state is prohibited from passing laws that restrict basic liberties, deny equality, or impair fundamental rights; so are associations and non-institutionalized groups.[53]

The public law theory subjects voluntary associations to much more than natural justice.

A defender of the theory might seek to weaken this conclusion on the basis that some constraints apply only to the legal order as a whole, not to every institution within that order. For

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49 Strictly speaking, Rawls' claim applies not to the state but to the 'basic structure' of society: John Rawls, "The Idea of Public Reason Revisited" (1997) 64:3 U Chicago L Rev 765. For another canonical account of neutrality, see Ronald Dworkin, "Liberalism" in Stuart Hampshire, ed, *Public and Private Morality*, (1978) Cambridge University Press.

50 *Mouvement laique québécois v Saguenay*, [2015] 2 SCR 3 at para 118.

51 For discussion of the role of democracy in authority, see Thomas Christiano, "The Authority of Democracy" (2004) 12:3 J Political Philos 266. Democracy is also recognized in the *Secession Reference* at para 61.

52 Jacob Weinrib, *Dimensions of Dignity* (Cambridge: Cambridge University Press, 2016), ch 2-3. Weinrib argues that the state has a duty to move towards being democratic, but can have authority despite failing to carry out this duty.

53 Jacob Levy, *Rationalism, Pluralism and Freedom* (Oxford: Oxford University Press, 2014) at 51. For discussions in political and legal theory sympathetic to this view, see Russell Hardin, "Cultural Diversity and Liberalism", in Jörg Kühnelt (ed), *Political Legitimation without Morality?* (Springer, 2008) 187-198; Sarah Conly, "In Defense of the (Somewhat More) Invasive State: Discussion of Corey Brettschneider's *When the State Speaks, What Should it Say*" (2016) 6:1 Philosophy & Public Issues (New Series) 25-37; Anat Scolnicov, "When Law, Religion and Family Meet: Private Choices, Religious Neutrality and the Liberal State" (2017) 79 SCLR (2d) 225-241; and Ludvig Beckman, "Three Conceptions of Law in Democratic Theory" (2023) 36:1 Can JL & Jur 65.

example, even if a modern state has to be democratic, it doesn't follow that every part of the state has to itself be democratic. Courts do not need to be democratic; nor does the army, or, say, the workers' compensation tribunal. But this point doesn't go far. Even though not every part of the state has to be democratic, every part has to be subject to democratic control — over who the decision-makers are and over the rules that they apply, if not over particular decisions. Thus, while the public law theory doesn't entail that every voluntary association has to be democratic, it does entail that they have to be subject to democratic control. Moreover, it does seem that the duty of neutrality applies to every institution within the legal order. It's not very tempting to say that courts, the army, or the workers' compensation tribunal can make their decisions for religious reasons, as long as the legal order as a whole is sufficiently neutral.

These consequences of the public law theory are not only awkward: they are incoherent. As Levy argues, a church that cannot limit its members' freedom of religion and association while they remain members is "unable to *be* a church".[54] If the Lakeside Colony were not allowed to impose church doctrine on its members and expel them for having the wrong views, it would not be able to exist as a religious community.[55] A political party that cannot expel people for their views cannot be a political party. In general, requiring voluntary associations to be neutral and democratic would seriously impair our ability to pursue our commitments in association with others.[56] Paradoxically, the imposition of these requirements on voluntary associations would undermine both neutrality and democracy by making it impossible for individuals to associate in pursuit of their conceptions of the good, or in pursuit of political power. I'm not suggesting that those sympathetic to the public law theory would embrace these consequences, but that these consequences follow whether accepted or not.

These problems stem from a deeper flaw. Being subject to the rules of an association is a choice, while being subject to the state's laws is not. Given this fact, voluntary associations are not subject to the legitimacy conditions that the state is subject to: those conditions are a response to the involuntary nature of belonging to a state.[57] A voluntary association is not a small state or a small part of the state, but something different. As Hoffman LJ wrote in *Ex parte Aga Khan*,

> [T]he mere fact of power, even over a substantial area of economic activity, is not enough. In a mixed economy, power may be private as well as public. Private power may affect the public interest and the livelihoods of many individuals. But that does not subject it to the rules of public law. … <u>I do not think that one should try to patch up the remedies available against domestic bodies by pretending that they are organs of government.</u>[58]

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54 Levy, *Rationalism, Pluralism and Freedom* at 53. As JN Figgis wrote, "It is a contradiction in terms to talk of joining a community and giving it no power": *Studies of Political Thought from Gerson to Grotius: 1414-1625* (Cambridge: Cambridge University Press, 1923) at 177.

55 See *Hofer et al v Hofer et al*, [1970] SCR 958 at 963, per Cartwright CJ: "Unless the members are free to enter into contracts of the sort set out in the Articles of Association, it is difficult to see how the Hutterian Brethren could carry on the form of religious life which they believe to be the right one."

56 For further discussion of problems that might arise in applying "substantive public principles" to private bodies, see Paul Craig, "Public Law and Control over Private Power" at 213.

[57] This does have the democratic consequence that the members of an association can, if they agree unanimously, change the rules, or transfer the association's property: *Wawrzyniak v Jagiellicz* (1988), 64 OR (2d) 81 (HCJ); *Polish Alliance of Association of Toronto Limited v The Polish Alliance of Canada*, 2017 ONCA 574.

[58] *R v Disciplinary Committee of the Jockey Club, Ex parte Aga Khan*, [1993] 1 WLR 909 (CA) at 932-933 (emphasis added).

4 The Kantian private law theory

Once you see it, the flaw in the public law theory is obvious. Voluntary associations are not state bodies. Insofar as they have any legal power over their members, that power is an exercise of private law rights, typically rights in property and contract. This is reflected in the rule that courts will only intervene in decisions made by voluntary associations where there is a civil right at stake.[59] A theory of the limits on associations' power should, therefore, start from its sources in property and contract.

In this section, I consider one such theory, derived from a Kantian account of private law. This theory is worth engaging with because it aspires to provide an internal interpretation of private law.[60] In other words, it aims to explicate the concepts already used by courts, lawyers and others when reasoning about private rights. Given that the theory appears successful in accounting for many private law doctrines, we might hope it would also account for the doctrines discussed in this paper.[61]

Kantian theorists hold that a notion of the mutual independence of persons is *the* justificatory idea in private law; as a first approximation, if a doctrine of private law is justified, it must be grounded in independence. Thus, while Kantian theorists have not tended to address voluntary associations, their theory suggests that the imposition of natural justice on voluntary associations should be justified on the same normative basis as other doctrines of private law. I will argue that this is on the right track insofar as it seeks an explanation rooted within private law, and specifically within property and contract law — the bodies of law which, for the most part, constitute voluntary associations. However, the Kantian private law theory is unable to provide this explanation, because it does not generate natural justice constraints on the ordinary exercise of property and contract rights. At best, the theory is able to *leave room* for natural justice in private law, without showing why it should be there.

As mentioned, the starting point of the Kantian account is independence: the ability to choose and pursue one's ends without being constrained by the choices of others. Independence is a conception of freedom: to be free is to be your own master, the one who gets to decide what aims you pursue.[62] This independence has to be realized in a system of private rights. Property and contract law are justified because, when individuals interact in accordance with these rules,

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59 *Dunnet*; *Tully v Farrell* (1876), 23 Gr 49 (Ont Ch); *McPherson v McKay* (1880), 4 OAR 501 (CA); *Itter v Howe* (1896), 23 OAR 256 (CA). For further discussion, see MH Ogilvie, "Ecclesiastical Law–Jurisdiction of Civil Courts–Status of Clergy: *McCaw v. United Church of Canada*" (1992), 71 Can Bar Rev 597 at 604 and 607-608, and MH Ogilvie, "Ecclesiastical Law—Jurisdiction of Civil Courts—Governing Documents of Religious Organizations—Natural Justice: *Lakeside Colony of Hutterian Brethren v. Hofer*" (1993) 72 Can Bar Rev 238. On 'civil rights', see *Ethiopian Orthodox*, at para 29; *Senez v Montreal Real Estate Board*, [1980] 2 SCR 555; *Hofer v Hofer et al*, 2022 MBCA 99; Holden, "Judicial Control of Voluntary Associations" at 350 and Anon., "Protection of Membership in Voluntary Associations" (1928) 37:3 Yale LJ 368.

60 On this point, see Ernest Weinrib, *The Idea of Private Law* (2012) Oxford University Press.

61 For some recent examples of work in this tradition, see Arthur Ripstein, *Private Wrongs* (2016) Harvard University Press; Peter Benson, *Justice in Transactions* (2019) Belknap Press; Ernest Weinrib, *Reciprocal Freedom: Private Law and Public Right* (2022) Oxford University Press.

62 Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge, Mass.: Harvard University Press, 2009) at 34-36; see also Ripstein, *Private Wrongs* at 6; Japa Palikkathayil, "Neither Perfectionism nor Political Liberalism" (2016) 44:3 Philos Public Aff at 175; Immanuel Kant, *The Metaphysics of Morals* in Mary J Gregor (ed), *Practical Philosophy* (Cambridge: Cambridge University Press, 1996) at 237, 393.

everybody's independence is respected. Moreover, private law should seek *only* to realize independence. As Ernest Weinrib writes, "[f]or a private law relationship to be coherent, the consideration that justifies any feature of that relationship must cohere with the considerations that justify every other feature of it"; in the case of private law, "their coherence is a matter of corrective justice", the conceptual structure that reflects the independence of the parties.[63] To import normative considerations other than independence into private law would destroy its coherence, and therefore its justification.

On this view, any limits on the way that voluntary associations treat their members can be derived only from the independence-based normative structure of private law. A key feature of this structure is that the rules of property and contract are formal. They let individuals choose what ends to pursue. There is no obligation to acquire property, or form contracts; it is up to you to choose which property to acquire, which contracts to form, and how to exercise these rights. Given this narrow basis for restricting the exercise of property and contract rights, it is hard to see how the Kantian account can arrive at natural justice requirements on voluntary associations. While both property and contract rights have limits on how they can be exercised, these limits do not generate natural justice requirements. I will begin with property and then consider contract.

For a Kantian, the basic right you have to your property is "the right that you be the one who determines how it will be used".[64] Put differently, "you can use your body and property to pursue any purpose whatsoever".[65] Property law "lacks an internal norm".[66] It does not require me to use my resources wisely, or at all; I can build an utterly unlivable dwelling on my own land, and nobody else is entitled to an explanation, beyond the fact that it is my property and so my choice. Contrast this with public law, where no matter how wide a discretion is granted to a public official, we are always entitled to some kind of explanation of how that power was exercised: no discretion is unfettered.[67] A private homeowner is entitled to expel others from their land, without offering, or even having, any reason to do so. So if the Lakeside Colony were simply a private landowner, it should not have been answerable to anybody else for its exercise of its right to expel, let alone required to exercise it in accordance with natural justice.

Even on the Kantian view, of course, there are constraints on the use of property. One is suggested by the dissenting reasons of Pigeon J in *Hofer v Hofer*. In that case, several members had been expelled from a Hutterite colony, the Interlake Colony, for converting to a different religion. Given the communal property regime, the expelled members left with nothing, not even owning the clothes on their backs. They sued, seeking remedies including the winding-up of the Interlake Colony and a share of its property. The majority upheld the expulsion on the ground of freedom of contract, noting that the colony's articles of association had been signed freely.[68]

Justice Pigeon dissented on the basis that the dependence created by the colony's property regime was contrary to public policy.

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[63] Ernest Weinrib, *The Idea of Private Law* at 32 and 74. For discussion and criticism, see Andrew Fell, "Corrective justice, coherence, and Kantian right" (2020) 70:1 UTLJ 40.
64 Ripstein, *Force and Freedom* at 95.
65 Ripstein, *Private Wrongs* (Cambridge, Mass.: Harvard University Press, 2016) at 182.
66 Ripstein, "Property and Sovereignty: How to Tell the Difference" (2017) 18:2 Theor Inq Law 243 at 244.
67 *Roncarelli v Duplessis*, [1959] SCR 121. See also Ripstein, *Private Wrongs* at 182.
68 *Hofer*, at 974-975.

> The evidence shows that the rules and practices of this religious group make it as nearly impossible as can be for those who are born in it to do otherwise than embrace its teachings and remain forever within it. ... They have no right at any time in their life to leave the colony where they are living unless they abandon literally everything. Even the clothes they are wearing belong to the colony and, according to the judgments below, they are to be returned to it as its property by anyone who ceases to be a member of the Church. ... [E]ach of the appellants was literally made *adscriptus glebae* and, in my view, such a result is contrary to public policy.[69]

The phrase used by Pigeon J. to characterize the status of the members of the colony was used by Kant in a discussion of the reason why one cannot contract to be a serf.

> No one can bind himself to this kind of dependence, by which he ceases to be a person, by a contract, since it is only as a person that he can make a contract. ... Someone can therefore hire himself out only for work that is determined as to its kind and its amount, either as a day laborer or as a subject living on his master's property. In the latter case he can make a contract, for a time or indefinitely, to perform services by working on his master's land in exchange for the use of it instead of receiving wages as a day laborer, or to pay rent (a tax) specified by a lease in return for his own use of it, without thereby making himself a *serf* (*glebae adscriptus*), by which he would forfeit his personality.[70]

These passages suggest a limit on the use of property and contract to give voluntary associations authority over their members. The property relations cannot be such that the members are rendered *adscriptus glebae*, with no ability to leave without the owner's agreement. A contract under which the members do not own even the clothes on their backs violates this limit.[71]

However, this limit does not generate natural justice requirements. The prohibition on contracting into serfhood is a limit on the substantive terms of a contract, not on the fairness of the procedure by which the contract is performed. Reading natural justice into the contract between the Interlake Colony and its members would not have changed the fact that the members owned nothing and therefore had no ability to leave without the owner's agreement.

A second possible limit is that owners are not entitled to use their property merely to harm others. Larissa Katz has argued that while harm to others might be a side-effect of decisions that are within an owner's jurisdiction to make, owners go outside their jurisdiction when they make decisions that are aimed at harming others.[72] Owners have authority to determine what a worthwhile use of their property is; in choosing merely to harm others, they are not choosing what they think is a worthwhile use. This limit does not generate natural justice requirements either. In *Lakeside*, Hofer and his associates were not expelled from the Lakeside Colony with the intent of harming them. They were expelled because the Colony's leaders felt that they were failing to respect the leaders' authority — authority which was closely tied to the distinctive conception of

69 *Hofer*, at 985-986 (emphasis added).
70 Kant, *Doctrine of Right* 6:330-331 at 472 (emphasis added).
71 See *Horwood v Millar's Timber and Trading Co Ltd*, [1917] 1 KB 305 at 311.
72 Larissa Katz, "Spite and Extortion: A Jurisdictional Principle of Abuse of Property Right" (2013) 122 Yale LJ 1444. Others reject this principle. Compare *The Mayor of Bradford v Pickles*, [1895] AC 587 (HL) and Allan Beever, *Freedom Under the Private Law* (Edward Elgar, 2023) at 194.

the good the Colony was oriented around. The leaders of the Colony were exercising their property rights in what they felt was a worthwhile, even morally obligatory way.

A principle of abuse of right might explain the requirement that associations not treat their members with bad faith. But failures to provide natural justice need not involve bad faith; this is why bad faith and natural justice are two different grounds for intervention into an association's decision.[73] In many cases, including *Lakeside*, the failure to provide natural justice was actually motivated by the group's good faith pursuit of its conception of the good. As McLachlin CJ argued in her dissent in that case, from the Hutterites' point of view, the Colony had not expelled the appellants. Rather, the appellants had expelled themselves, by rejecting the punishment offered by the Colony. From the Colony's perspective, as McLachlin CJ expressed it, "formal notice was not necessary to permit the appellants to present their defence; indeed the concept of formal notice does not arise because the expulsion of the appellants was essentially a self-expulsion".[74]

It might be argued that we should instead draw on the conception of ownership as an *office* — a role that brings with it rights and duties in a certain domain and constrains how those rights and duties can be exercised.[75] An owner of property has authority to make decisions about what will happen with their property, just as the state has authority to make decisions within its jurisdiction. Perhaps one of the duties of the office of ownership is to exercise property rights only in accordance with natural justice.

The conception of ownership as an office does leave room for the claim that the powers of an owner have to be exercised fairly.[76] However, there are two problems with taking this route. The first is that we do not yet have an explanation of why natural justice would be a duty of this office. The second is that natural justice cannot be inherent in the office of ownership as such: this would mean, contrary to the law of property, that *every* owner has to exercise their powers in accordance with natural justice.[77] What we need, and what the idea of office fails to give us, is an explanation of what it is about voluntary associations in particular that renders natural justice a duty associated with *their* property rights.

Contract might seem a more promising place to derive natural justice requirements. The relations of the members of voluntary associations *inter se* are contractual if they meet the conditions of contract formation, including an intention to contract.[78] This is why, aside from challenges on the basis of natural justice, the decisions of an association can also be challenged on the basis that they violate the association's rules.[79]

As with property, Kantian theorists recognize certain apparent limits on freedom of contract as built into the nature of contract. The doctrine of consideration in contract law follows from the

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73 See *Baird* at 670 and *Dawkins* at 630.

74 *Lakeside Colony* at 228.

75 See Christopher Essert, "The Office of Ownership" (2013) 63:3 UTLJ 41; Larissa Katz, "The Moral Paradox of Adverse Possession: Sovereignty and Revolution in Property Law" (2010) 55:1 McGill LJ 47; Christopher Essert, "The Office of Ownership Revisited" (2020) 70:Supp 2 UTLJ 287; Konstanze von Schütz, "Keeping It Private: The Impossibility of Abandoning Ownership and the Horror Vacui of the Common Law of Property" (2021) 66:4 McGill LJ 721 at 744-745.

76 After all, "an office is something subject to abuse": Dennis Klimchuk, "Equity and the Rule of Law" in Lisa Austin & Dennis Klimchuk, eds, *Private Law and the Rule of Law* (Oxford: Oxford University Press, 2014) at 259.

77 See *Harrison v Carswell*, [1976] 2 SCR 200. As Essert has argued ("Revisited", at 297), certain powers of owners, such as the power to create an easement, are constrained in various ways. But this exception is not relevant here.

78 *Ethiopian Orthodox* at para 39; *The Satanita*, [1895] P 248 (CA) aff'd [1897] AC 59 at 255.

79 *Wall* at para 24; see also *Orr v Brown*, [1932] 3 DLR 364 (CA).

presumption that nobody would intend to restrict their own freedom "simply for the purposes of another".[80] The doctrine of unconscionability, which renders unenforceable contractual terms which are both improvident and the result of an inequality of bargaining power, is really an elaboration of this point.[81] In a situation of unequal bargaining power, the weaker party cannot reasonably be taken to have intended an improvident bargain for the benefit of the other party, so the bargain should not be enforced.[82] However, unconscionability is not a possible explanation of natural justice requirements. The agreement to join a voluntary association may attract such requirements even though it is neither improvident nor a result of unequal bargaining power — for example, the decision to join a club is likely neither.

A more plausible explanation is that natural justice is an implied term of the contracts that constitute voluntary associations.[83] Courts interpret such contracts as requiring natural justice whether or not it is expressly stated. Peter Benson offers a Kantian account of implied terms. On this view, the basis for implication is that contracting parties are presumed to intend what is necessary to avoid a failure of consideration, in the sense of something "which would render the promised performances futile, without value or benefit, or just manifestly absurd".[84] For example, a contract for space to unload cargo from a ship would make no sense without an implied warranty that this was a safe place to tie up the ship.[85] In determining what the parties must have intended, a court looks at their transaction with a view to what is reasonable.[86]

Now, there are two questions to ask about Benson's account in relation to natural justice. One question is whether it leaves room for natural justice as an implied term in certain agreements. The other question is whether it explains why natural justice is such a term. In my view, the answer to the first question is yes, but the answer to the second is no. Benson's account leaves room for natural justice, because it would be reasonable for a court to hold that the parties, in setting up a voluntary association, must have intended that its authority be exercised in accordance with natural justice. But nothing in the account explains how the court would arrive at this conclusion. Why, exactly, would a voluntary association which treated its members without natural justice be "futile, without value or benefit, or just manifestly absurd", when other kinds of contracts are not required to provide natural justice? I'm not suggesting that no explanation is available — only that it is not provided by Benson's account.

In an article discussing a related doctrine, Benson comes to a similar conclusion.[87] His article deals with cases about 'common callings' and 'property affected with a public interest', in which courts oblige those engaged in certain kinds of business, or those who own certain kinds of property, to exercise their private rights in non-arbitrary ways. For example, the owner of a public inn may be "under an obligation to receive without discrimination any traveller … supposing that the inn is objectively in a position to accommodate the traveller and the traveller is both willing

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80 Ripstein, *Force and Freedom* at 115.
81 Uber Technologies Inc v Heller, 2020 SCC 16.
82 See Benson, *Justice in Transactions* at 174.
83 Beetz J obliquely suggests this in *Senez* at 567–8; see also Aylward, *Unincorporated Associations* at §8.21.
84 Benson, *Justice in Transactions* at 142.
85 *The Moorcock* (1889) 14 PD 64 (CA); see also *Energy Fundamentals Group Inc v Veresen Inc*, 2015 ONCA 514.
86 Benson, *Justice in Transactions* at 131, 144.
87 Peter Benson, "Equality of Opportunity and Private Law" in D Barak-Erez & D Friedmann (eds), *Human Rights in Private Law* (Hart Publishers, 2002) 201-243.

and able to pay for the accommodation and is in a fit state to be received".[88] The point is that these obligations "are not reducible to those that ordinarily come under the juridical conception of rights"; they require the owner of the inn to confer a benefit on a member of the public who has done nothing to acquire such a right.[89] Benson's view is that while the non-arbitrariness requirement is compatible with private law, its basis lies beyond private law, in a right held by members of the public as such. Similarly, while requirements of natural justice are compatible with contract law as understood by Kantian theories, we have to look beyond such theories to explain why these requirements exist.

Let me end by noting that one might associate natural justice with the organizing principle of good faith in contract.[90] This principle is said to play a role in the law of implied terms.[91] It also underlies constraints on the exercise of contractual discretion, such as where one party has an option to buy from the other, or where a company is considering bids submitted in a tendering process.[92] It requires such discretion to be exercised reasonably — not arbitrarily or capriciously.[93] It is plausible to associate natural justice with the principle of good faith, but the explanatory gain is limited. Good faith does not, in general, require that exercises of contractual discretion be carried out in a procedurally fair way; for example, it does not require that an employee be terminated only after having a chance to make representations.[94] So while natural justice might be said to be a manifestation of good faith in the context of voluntary associations, one still needs an explanation of why good faith manifests in this way in this context and not elsewhere.

To sum up, both property and contract leave room for natural justice requirements, but Kantian theories offer no explanation of why these requirements arise. The reason for this explanatory gap is that these are theories of property and contract in general; as a result, they can only tell us things about voluntary associations that are also true of other instances of property and contract. But, even though voluntary associations are constituted by property and contract, natural justice requirements are not explained by what voluntary associations have in common with other instances of property and contract. As Terence Daintith has noted, "<u>the one major contractual field</u> in which natural justice principles are routinely applied is that of constitutive contracts setting up bodies of persons like clubs and trade unions and providing for some of their number… to take decisions on questions like membership and discipline".[95] These requirements seem to be a response to the rule-making and rule-applying authority of voluntary associations — authority that looks similar to that of the state, and quite different from ordinary relations of property and contract. From a Kantian point of view, however, this similarity is merely apparent. The crucial

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[88] Benson, "Equality of Opportunity" at 232; see *Burgess v Clements* (1815), 4 M & S 306 and *Rothfield v North British Railway Co*, [1920] SC 805.
[89] Ibid at 234.
[90] *Bhasin v Hrynew*, 2014 SCC 71 at para 63.
[91] *Bhasin* at para 44.
[92] *Bhasin* at paras 50, 56; *Mitsui & Co (Canada) Ltd v Royal Bank of Canada*, [1995] 2 SCR 187; *Martel Building Ltd v Canada*, 2000 SCC 60 at para 88.
[93] *Wastech Services Ltd v Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7 at paras 62, 67.
[94] *Bhasin* at 54, citing *Wallace v United Grain Growers Ltd*, [1997] 3 SCR 701 at para 76. Certain cases have required procedural fairness in dismissal of public employees: *Ridge v Baldwin*, [1964] AC 40; *Knight v. Indian Head School Division No. 19*, [1990] 1 SCR 653. See for discussion Mullan, "Administrative Law at the Margins" at 142. The scope of these cases is limited by *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 102-105.
[95] Daintith, "Contractual Discretion and Administrative Discretion" at 580 (emphasis added).

fact about the state is that it is mandatory.[96] As a result, the similarity between voluntary associations and the state cannot explain natural justice requirements.

5 Reciprocity and the rule of law

We've now considered two theories of natural justice requirements in voluntary associations, neither of which was adequate, but both of which offer lessons for a better account. The public law theory drew on the similarities between the rule-making and rule-applying authority of states and that of voluntary associations, but attempted to impose requirements on voluntary associations which only seem appropriate for involuntary associations like the state. The Kantian private law theory located voluntary associations within the law of property and contract, but failed to explain how decisions by voluntary associations differ from other exercises of property and contract rights, such that they should be subject to natural justice when property and contract rights in general are not. A natural thought is that what distinguishes these decisions from other exercises of property and contract rights is that they involve rule-making and rule-applying authority. What we need, then, is a theory that explains how this kind of authority could make a difference within property and contract law. In this section, I offer such a theory, drawing on Lon Fuller's idea of *reciprocity*. I'm not going to offer a comprehensive defense of Fuller's account. Rather, I aim to show that if Fuller's account is correct, then it explains why, and to what extent, voluntary associations are subject to natural justice requirements.

Fuller was interested in the various ways human beings coordinate our conduct so as to order social life. In an early paper, he distinguishes two 'principles of human association': *shared commitment* and the *legal principle*. These are not different structures of association (like hierarchical vs. flat structures). They are different kinds of 'glue' that hold associations together: different principles of, or ways of generating, social order.[97] Most associations will involve both principles, but one or the other may dominate in a particular association. The legal principle and shared commitment can both stand in tension with each other and reinforce each other.[98]

Shared commitment involves associating around the pursuit of a particular purpose or purposes. By a 'purpose', I mean either an end (like criminal justice reform, or salvation), or an end pursued by a particular means (like attending protests to achieve criminal justice reform, or following the rules of Hutterianism to achieve salvation). Commitment to a purpose or purposes is what holds the group together and coordinates the members' actions. As Fuller notes, shared commitment need not be emotional: a scientific research group has a shared commitment to discovering truth by scientific methods.

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96 Compare John Gardner, "Private Authority in Ripstein's Private Wrongs" (2016) 14:1 Jrslm Rev Leg Stud 52.

97 Lon L Fuller, "Two Principles of Human Association" in Kenneth I Winston, ed, *The Principles of Social Order: Selected Essays of Lon L. Fuller* (Durham, NC: Duke University Press, 1981) at 85. These are not the only ways of generating order: see "The Role of Contract in the Ordering Processes of Society Generally" in *The Principles of Social Order* at 188. For discussion of the broader project of which this essay forms a part, see Kirsten Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L Fuller* (2012) Hart Publishing, chapter 2. Related discussions can be found in Max Weber, *Theory of Economic and Social Organization*, translated by AM Henderson & T Parsons (1947) The Free Press at 136 and Michael Oakeshott, *On Human Conduct* (1991) Clarendon Press at 158.

98 Kevin Vallier, "Associations in Social Contract Theory: Toward a Pluralist Contractarianism" (2020) 68:2 Political Studies 486 at 489.

The legal principle characterizes an association which "is held together and enabled to function by formal rules of duty and entitlement."[99] Despite the name, it is not limited to those associations which exercise what we would ordinarily think of as legal authority, with a sovereign that exercises coercive force; rather, it refers to "formalized rules that govern the relations within an association", which can include "formalized rules of morality" that are not coercively enforced.[100] Groups characterized by the legal principle function in virtue of general rules that govern their members' interactions. Rather than pursuing a common purpose, members pursue their own purposes within these rules. A small-scale example might be the internet-based groups where people associate to barter household goods. On a bigger scale, the buyers and sellers who associate through Amazon do so not because they share any commitment to Amazon's purposes, but because its rules are a framework within which to pursue their own ends.

Fuller argues that rule of law constraints are implicit in the legal principle. What distinguishes law from other modes of social ordering is that it provides "baselines for human interaction", setting up a framework within which people can pursue their own ends: "The law does not tell a man what he should do to accomplish specific ends set by the lawgiver; it furnishes him with baselines against which to organize his life with his fellows."[101] In other words, law serves to render coherent people's pursuit of their ends rather than guiding them into pursuing a common end. In case this seems too strong a claim, remember that 'law' in the sense of the legal principle is not coextensive with state-made law. On the one hand, a voluntary association might set up general rules without those rules constituting state-made law. The canon law of the Roman Catholic Church, or the Statutes of the Second International, aim to organize conduct using the legal principle, but are not state-made law. On the other hand, some proportion of state-made law may not qualify as 'law' in the sense of the legal principle, because it serves to guide us in pursuing a common end or to preclude certain ends.[102]

In order for the general rules of an association to play this role of facilitating human interaction, those subject to them must have stable expectations for predicting and interpreting each other's conduct: "[t]o engage in effective social behaviour men need the support of intermeshing anticipations that will let them know what their opposite numbers will do, or that will at least enable them to gauge the general scope of the repertory from which responses to their actions will be drawn."[103] Just as the existence of a common language requires shared understanding of what utterances mean, social ordering under the legal principle requires stable expectations about how we will conduct ourselves.

Now, not all instances of the legal principle involve a lawmaker; systems of customary law may not. But where there is a lawmaker, a particularly important subset of these stable expectations are expectations of *reciprocity* between the lawmaker and the law's subjects:

> On the one hand, the lawgiver must be able to anticipate that the citizenry as a whole will accept as law and generally observe the body of rules he has promulgated. <u>On the other hand, the legal subject must be able to anticipate that government will itself abide by its own</u>

99 Fuller, "Two Principles" at 71.
100 Fuller, "Two Principles" at 87.
101 *Ibid*.
102 Lon L Fuller, "Human Interaction and the Law" (1969) 14:1 Am J Juris 1 at 22.
103 Fuller, "Human Interaction" at 2.

> declared rules when it comes to judge his actions... [T]he enactment of general rules becomes meaningless if government considers itself free to disregard them whenever it suits its convenience.[104]

Rules will not coordinate human conduct if the rule-maker cannot largely expect the rules to be followed, or if those subject to the rules cannot largely expect the rules to be applied. The upshot is that the existence of *any* system of rules that uses the legal principle relies on a reciprocal relationship of lawmakers towards subjects and subjects towards lawmakers.

As Fuller argues in *The Morality of Law*, this point entails that even a would-be arbitrary lawmaker is subject to the constraints of the rule of law. The governor does not have to order social life with law, but if they do choose to use law, then they have to maintain the reciprocity on which law depends.[105] If the subjects of the rules are not able to know what the rules require, or if the rules are contradictory, they will not be able to follow them. If the rules are applied in a biased or inaccurate way, or if the authorities do not follow the rules, then subjects will not shape their behaviour around the rules, but around the whims of the authorities. And so on. As a result, the formal features of the rule of law are implicit in the legal principle.

Fuller's writing often seems to waver between an empirical claim (that organizing human conduct under the legal principle is ineffective without reciprocity) and a constitutive one (that reciprocity is built into legal ordering). The second reading fits better with Fuller's view that the legal principle reflects human dignity: "Every departure from the principles of law's inner morality is an affront to man's dignity as a responsible agent".[106] Ordering under the legal principle does not tell those subject to it what ends they should pursue. In this way it shows respect for subjects' ability to determine their own ends. Reciprocity is not an empirical means to showing this respect; rather, it is constitutive of it.

Now, as Jeremy Waldron has observed, Fuller says little about the *procedural* aspects of the rule of law.[107] This is problematic for present purposes, because natural justice requirements such as an impartial decision-maker and a chance to make representations are about procedure. However, as Waldron argues, these procedural aspects are just as much grounded in reciprocity as the formal aspects that Fuller focuses on. Rules have to be applied. Organizing subjects' conduct requires a procedure for determining whether their conduct is consistent with the rules. A rule only comes alive in being applied; if the application of the rules is not impartial and intelligible to its subjects, then it matters little if the rules themselves are impartial and intelligible. So the legal principle is also constituted by the procedural aspects of the rule of law.

We now have the materials for an explanation of why, and to what extent, voluntary associations are subject to natural justice requirements. Voluntary associations may use the legal principle as a way of organizing human conduct. They do so when they set out and apply general rules within which individuals can pursue their own ends. They need not leave total freedom for individuals to choose their ends; most voluntary associations involve both shared commitment and

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104 Fuller, "Human Interaction" at 24 (emphasis added).

105 For discussion, see Part 4 of David Dyzenhaus, "Liberty and Legal Form" in Austin & Klimchuk, eds, *Private Law and the Rule of Law*.

106 Lon L Fuller, *The Morality of Law* (New Haven and London: Yale University Press, 1969) at 162; see also Rundle, *Forms Liberate* at 10.

107 Jeremy Waldron, "The Rule of Law and the Importance of Procedure" in James Fleming, ed, *Nomos 50: Getting to the Rule of Law* (New York: New York University Press, 2011).

the legal principle, setting out a broad end which leaves scope for individual choice as to specifics.[108] To the extent that the legal principle is going to do any work, however, there must be reciprocity between the group and its members: expectations that the members will follow the group's rules and that the group will itself apply the rules in dealing with members. This reciprocity requires that the group conform to the procedural constraints of the rule of law. What the common law calls 'natural justice' is an articulation of these requirements.

This is why, in the case of some voluntary associations, natural justice is a duty of the owner (in the case of property) or an implied term (in the case of contract).[109] A voluntary association which attempted to make rules to render coherent its members' pursuit of their ends, but did not require the association to apply the rules fairly, would not function. In setting up such an association, the members must, objectively, have intended that natural justice be part of it. However, this explanation adverts to a characteristic that voluntary associations share with the state: namely, they make and apply rules to facilitate human interaction, in accordance with the legal principle. In this sense, we've also vindicated the intuition behind the public law theory — that voluntary associations are subject to natural justice because, and to the extent that, they play a 'governmental' function — without bringing along all the requirements of public law.

We also have an explanation of why natural justice requirements are not universally imposed in private law. Many one-off property-based interactions or contractual relationships do not involve the parties in organizing conduct under the legal principle, and therefore do not attract natural justice requirements. Indeed, some voluntary associations also do not involve the legal principle, or only to a minimal degree, as they rely more on shared commitment to coordinate the conduct of their members. This explains why natural justice requirements are more stringent in some situations than in others. As I mentioned earlier, the stringency of the requirements can vary depending on the nature of the association involved.[110] Now, what we should expect from the account I have set out is that natural justice applies to the extent that a group functions in accordance with the legal principle. And in fact this is what we see.

Social clubs are supposed to be friendly — their members have to not only be civil to each other but actually get along. The successful functioning of a social club depends less on shared expectations of rule-following and more on personal affection among members. This tends to favour a lower standard of fairness.[111] By contrast, because a union is "not an association in which the personal relations of its members are important", a higher standard may be imposed.[112] The functioning of these kinds of association requires a greater degree of reciprocity, so there is stronger reason to impose natural justice requirements.

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[108] Kathyrn Chan makes a similar observation in terms of a distinction between "individual project pursuit" and "collective project pursuit" in "Not-For-Profit Organizations, Public Law and Private Law" in Matthew Harding (ed), *Research Handbook on Not-For-Profit Law* (2018) Elgar at 218.

109 For a related use of Fuller, see Lisa M Austin, "Property and the Rule of Law" (2014) 20 Leg Theory 79.

110 For comments on various kinds of association and ways courts may treat them, see JF Josling & Lionel Alexander, *Law of Clubs: with a note on unincorporated associations* (London: Longman, 1987) at 218; and Anon., "Developments in the Law–Judicial Control of Actions of Private Associations" (1963) 76 Harv L Rev 983 at 1011ff.

111 *Barrie v Royal Colwood Golf Club*, 2001 BCSC 1181 at paras 63–64; *Sahaydakivski v YMCA of Greater Toronto*, [2006] OJ No 1368 at para 37; *Lee v Showmen's Guild of Great Britain*, [1952] 1 All ER 1175 at 1181.

112 *Astgen v Smith*, [1970] 1 OR 129 (CA), per Laskin JA (dissenting); see also *Garcia v Kelowna Minor Hockey Assn*, 2009 BCSC 200 at para 31. Compare Evelyn Douek, "Facebook's 'Oversight Board:' Move Fast with Stable Infrastructure and Humility" (2019) 21 NC JL & Tech 1.

To the extent that a group is held together by shared commitment, the natural justice requirements that courts impose will be less stringent.[113] This often occurs in religious associations, where courts tend to be deferential. Such concerns are reflected in McLachlin CJ's dissent in *Lakeside*, which argued that formal notice would have served no purpose given the Hutterites' understanding of their processes. But the same phenomenon occurs in non-religious contexts where people associate around a conception of the good: for example, in intentional communities designed around social, political or ecological ideals, and in political parties and activist groups. These kinds of association do not function predominantly by setting up general rules within which individuals pursue their own ends but rather by commitment to a common end. Judicial intervention can do more harm than good.

The account meets both of the desiderata I noted at the beginning of this section. It locates the ground of natural justice requirements within the private-law nature of voluntary associations: these requirements are imposed by the law because they are implicit in the choices of members. But the reason why these requirements are implicit is something voluntary associations have in common with the state — namely, that they facilitate their members' pursuit of their ends by way of general rules. So it makes sense that courts would borrow from administrative law in elaborating what natural justice requires.[114]

6 Objections

That concludes the presentation of my account. In this section I consider three objections.

First objection. Even if the reciprocity-based account is a possible explanation for natural justice, it is an unnecessarily roundabout one. A simpler explanation may be drawn from recent writing on the rule of law.

The simpler explanation draws on the tradition of republicanism in political philosophy.[115] It starts from the claim that legality is opposed to arbitrary power.[116] This is not meant as a contingent claim, but as the core of the rule of law. Arbitrary power, on this view, is control over someone else's actions or options which is exercisable at your whim. Gerald Postema observes that private power can be arbitrary just as much as public power, and indeed that private corporations and collectivities can have power that exceeds that of many governments.[117] As a result, "[i]f we are truly concerned about providing protection and recourse against the arbitrary

[113] See Cécile Laborde, *Liberalism's Religion* (2017) Harvard University Press at 178; Mullan, "Administrative Law at the Margins" at 148-150; and Janet McLean, "Intermediate Associations and the State" at 169. For a different approach to this spectrum, see Chan, "Not-For-Profit Organizations" at 219.

[114] For relevant discussion see Ewan McKendrick, "Judicial Control of Contractual Discretion" in Mark Freedland and Jean-Bernard Auby (eds), *The Public Law/Private Law Divide: Une entente assez cordiale?* (2006) Hart at 213.

115 See Quentin Skinner, "A Third Concept of Liberty" (2002) 117 Proc Br Acad 237 and Philip Pettit, "Freedom as Antipower" (1996) 106:3 Ethics 576. I will refer to this as the 'simple' republican account, because Fuller's more complex account has republican elements: Dyzenhaus, "Liberty and Legal Form".

116 Gerald J Postema, "Fidelity in Law's Commonwealth" in Lisa M Austin & Dennis Klimchuk, eds, *Private Law and the Rule of Law* (Oxford: Oxford University Press, 2014) at 17. See also Robin L West, "The Limits of Process" in Fleming, ed, *Getting to the Rule of Law: Nomos L* at 47.

117 Postema, "Fidelity in Law's Commonwealth" at 24.

exercise of power, then law must rule in the private as well as the public domain".[118] The reason voluntary associations are subject to natural justice requirements is simply that they can exercise arbitrary power. Similarly, John Alder has argued that courts have a "supervisory jurisdiction" which aims "to ensure that powers are exercised in accordance with basic standards of legality, fairness and rationality", whether or not these powers fall within public law or private law; as a result, whenever there is no alternative remedy available, judicial review should be available "to protect the individual against the abuse of power".[119]

According to this argument, the rule of law is opposed to the arbitrary power of (among others) groups, whether or not the group operates accordance with the legal principle. If it succeeds, this argument arrives at the conclusion that voluntary associations are subject to the rule of law without relying the claim that reciprocity is constitutive of the legal principle. This may be a strength, but it also points to a troubling consequence of the simple republican account. If the rule of law is opposed to arbitrary power, then it is opposed to it whether in a family or in a voluntary association, and it is opposed to it to the same degree whether the association is a homeowners' association, a church or a political party. In all of these cases, if there is arbitrary power then the rule of law should respond. As a result, the simple republican account imposes natural justice across the board, indiscriminately. By contrast, the reciprocity-based account contains an internal limitation on where and to what extent natural justice applies: it applies where, and to the extent that, a group functions according to the legal principle.

Now, this is not the place for a full discussion of the pros and cons of legalism.[120] Let me mention just one problem with this consequence. Even if imposing natural justice does lead to more fairness, this can come at the cost of other values. As Timothy Macklem has argued, the pursuit of justice can drive out values such as kindness, generosity, compassion or love: "[s]uch forms of goodness are constituted, in part, by their disregard for what is due."[121] Macklem's argument is not that justice is bad, but that the transparency and 'regard for what is due' that justice involves cannot comfortably coexist with certain other goods. This is not merely a theoretical problem. Natural justice may come at the cost of personal relationships in a social club, or solidarity in a union,[122] or changed convictions in a religious congregation.[123] Even where there is a risk of arbitrary power, therefore, it does not follow that the law should seek to constrain it by imposing natural justice. It may not be worth the cost.

Of course, a defender of the account might accept this point. Nothing in their account demands that republican freedom be the *only* value. They might accept that in some cases it is

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118 Postema, "Fidelity in Law's Commonwealth" at 29. As Klimchuk writes, the idea "that a party can by right be subject to the arbitrary will of another ... is just what the rule of law … is set against": "Equity and the Rule of Law" in Austin & Klimchuk, eds, *Private Law and the Rule of Law* at 256-257. See also Frank Lovett, "A Republican Argument for the Rule of Law" (2023) 26:2 CRISPP 137 at 148.

119 Alder, "Obsolescence and Renewal" at 162-163.

120 See Judith Shklar, *Legalism: Law, Morals, and Political Trials* (1986) Harvard University Press.

121 Timothy Macklem, "The Price We Pay For Justice" (2020) 11:3 Jurisprudence 417 at 418.

122 See Michael Lynk, "Denning's Revenge". Fuller was alive to these limitations: see "Two Principles" at 92.

123 In *Bannatyne v Overtoun*, [1904] AC 515, the Free Church of Scotland had voted (643 to 27) to merge with the United Presbyterian Church of Scotland. The minority, objecting that the Presbyterians' beliefs were contrary to fundamental tenets of the Free Church, obtained a declaration that they were the true Free Church and entitled to all of its assets. As JN Figgis wrote, "[b]y identifying the church with the strict terms of those documents, the law denied to it, or any other church, the capacity to change, develop and grow": *Churches in the Modern State* (1913) Longmans, Green and Co at 18. The court's decision was overturned by Parliament in the *Churches (Scotland) Act 1905*, 5 Edw 7 c 12.

outweighed. But in developing a view of when it is appropriate to impose natural justice and when not, the republican ought to look for a general characterization of the situations where the rule of law should predominate. In doing so, the republican is liable to reinvent the 'principles of social order' that Fuller begins from. On this construal, republicanism is not an alternative to Fuller's account, but rather a source of theoretical resources that might be used in developing that account. While there is more to be said here, these problems suggest that republicanism is not a short cut to explaining natural justice.

Second objection. In suggesting that voluntary associations can be subject to the rule of law, I'm implying that voluntary associations *make law* for their members. But they don't. In ordinary usage, we might refer to the norms imposed by a corporation or a union as 'rules', or perhaps 'by-laws', but not as 'laws'. Indeed, the ability to distinguish between the rules of associations and genuine laws has been seen as a virtue in a theory of law.[124] So it is a problem for my account if it suggests, or requires, that the rules of certain voluntary associations must count as law to be subject to requirements of natural justice.

But my account does not have this implication. The claim is not that the rules of certain voluntary associations count as law, but that the rules of voluntary associations are subject to certain normative requirements — requirements we refer to under the title 'the rule of law' or 'legality' — for the same reason that laws are subject to those requirements. The rule of law is applicable wherever rules are used to coordinate people's pursuit of their own ends in accordance with the legal principle, whether those rules are adhered to voluntarily or imposed involuntarily. It's consistent with this that a rule only counts as a law if it meets some other condition, for example that it be imposed involuntarily as part of a comprehensive system.

Third objection. Not all rules of voluntary associations are contractual, property-based, or otherwise enforceable by the legal system; many such rules are not legally binding in any way. This was made clear in *Ethiopian Orthodox*, where it was held that the rules of a church did not constitute a contract among the members, as there was no objective intention to contract.[125]

I agree. My claim is that sometimes the rules of a voluntary association are normatively subject to the rule of law, and may be normatively problematic if they violate rule of law requirements. It doesn't follow that a court is always entitled to fix the problem. An association's rules may generate a rule of law problem that the legal system does not, and should not, solve.[126] When a decision by a voluntary association does affect the legal rights of a member, a court is entitled to intervene if the decision violates requirements of natural justice. When a decision by a voluntary association does not affect the legal rights of a member, then a court is not entitled to intervene, whether or not the decision was fair. It might still be true that the association should have acted fairly — but a court has no jurisdiction to do anything about it.

It is important to separate the question of jurisdiction to intervene from the question of whether the association ought to act fairly. Even if a court has no jurisdiction to intervene,

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124 See Scott J Shapiro, *Legality* (Cambridge, Mass.: Belknap Press, 2011) at 219ff; Joseph Raz, *Practical Reason and Norms* (London: Hutchinson, 1975) at 151-153. As Raz points out, we can accept that courts are required to act on norms such as the rules of associations without characterizing these norms as part of the law.

125 *Ethiopian Orthodox* at para 52.

126 As held in *Domtar Inc v Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 SCR 756, even where an administrative tribunal issues conflicting decisions, generating a rule of law problem, it does not follow that a court should intervene: it may be for the tribunal to solve the problem. See also David Dyzenhaus, *The Long Arc of Legality: Hobbes, Kelsen, Hart* (Cambridge: Cambridge University Press, 2022) at 250-251.

procedural fairness at one level of a voluntary association may lead to intervention by a higher up level of the same association, as when a decision by the local branch of a political organization is overridden by the national headquarters. And from the point of view of the member who suffers a violation of natural justice, there is still a normative problem with what has taken place, even if that problem cannot be redressed by the legal system.

7 Conclusion

The common law's imposition of natural justice on voluntary associations is justified, but not as an application of public law norms to voluntary associations, and not as a direct consequence of the norms applicable throughout private law. Rather, these requirements flow from the way that voluntary associations organize their members' conduct under rules. From one point of view, this conclusion may sound merely conceptual. But from another point of view it reflects common experience. If you join a political party, a union or a club, and the association requires you to follow certain rules, then you also expect those rules to be followed and applied fairly. This is the basis for the attitudes of trust and reliance among members which allow the association to function. And it is what courts draw on in requiring voluntary associations to respect natural justice when making decisions affecting their members' legal rights.

Let me close with two corollaries suggested by my argument — one theoretical and one practical. The theoretical corollary is that legality is not limited to the state: it also occurs at organizational scales smaller and larger than the state. Voluntary associations can bring about the kind of good order achieved by law, but they can also be the source of rule-of-law failures. In this way, the common law doctrine we've been considering aligns with arguments made by legal pluralists.[127] The practical corollary is that, while there are reasons for states to regulate large non-state associations to ensure that they treat their members fairly, the common law itself already has the resources to require this. As private organizations grow in size and power, and as states retreat from domains they previously occupied or regulated, these resources may be useful.[128]

[127] See Sally Engle Merry, "Legal Pluralism" (1988) 22:5 Law & Society Review 869; Val Napoleon, "Thinking About Indigenous Legal Orders" in Colleen Shepard & Kirsten Anker (eds), *Dialogues on Human Rights and Legal Pluralism* (2012) Springer; Nicole Roughan, *Authorities: Conflicts, Cooperation, and Transnational Legal Theory* (2014) Oxford University Press.

[128] See Mullan, "Administrative Law at the Margins" at 159.